PEARSON, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	CASE NO. 1:18CR739
Plaintiff,	)	
	)	
v.	)	JUDGE BENITA Y. PEARSON
	)	
ANTHONY CLARK,	)	
	)	**MEMORANDUM OF OPINION AND ORDER**
Defendant.	)	
	)	[Resolving ECF No. 11]

Pending before the Court is Defendant Anthony Clark's Motion to Suppress. ECF No. 11. The Government responded. ECF No. 14. Defendant did not file a reply. The Court has been advised, having reviewed the record, parties' briefs, and applicable law and considered the testimony of witnesses, exhibits admitted into evidence, and arguments of counsel offered during the evidentiary hearing. For the reasons set forth below, Defendant's motion is denied.

I.

On the night of August 21, 2018, detectives from Cleveland Police's Gang Impact Unit were patrolling on Union Avenue, near its intersection with East 76th Street, in unmarked police cars. ECF No. 14 at PageID #: 69. During the patrol, Sergeant Al Johnson, who was driving the lead car, spotted a Jeep SUV stopped in the middle of East 76th Street with its engine running and men standing around it. *Id.* at PageID #: 70. The Jeep was stopped at night in a high crime

area, near a house from which Sgt. Johnson had, years earlier, stopped a person illegally in possession of marijuana.[1] *Id.* at PageID #: 69.

Sgt. Johnson testified that he saw approximately five men, including Defendant, standing around all sides of the Jeep. *Id.* at PageID #: 70. As Sgt. Johnson approached the Jeep SUV in his unmarked vehicle, the SUV drove away, and the five men quickly walked away in opposite directions. *Id.* Three of the men, one of whom was Defendant, walked to the east side of East 76th Street. *Id.* Defendant sat down on a milk crate near the sidewalk. *Id.* Sgt. Johnson radioed the officers following him that he suspected a drug deal was afoot. Sgt. Johnson testified that it was common to observe drug deals on the street in this area.

Defendant testified that he, too, saw the car stopped in the street. He claims, instead, that he saw the car from the vantage point of his seat on the milk crate where he had been, and remained, until Sgt. Johnson told him to stand. He denies having been one of the men standing next to the Jeep.

Sgt. Johnson parked and exited his vehicle and approached the three men on foot. *Id.* Detectives Gumicio and McGrath, who followed Sgt. Johnson in a separate unmarked car, also stopped their cars and walked towards the three men with Sgt. Johnson. *Id.* It is disputed whether any of the officers activated their overhead lights upon arrival.[2] *Id.*; ECF No. 11 at PageID #: 40.

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[1] Sgt. Johnson testified that, because the gang unit to which he is assigned is responsible for patrolling the entire city of Cleveland, he does not frequently return to the same areas.

[2] The defense claims overhead lights were activated prior to the Jeep driving off.

Sgt. Johnson testified that, in a casual tone, he asked the three men if any of them were armed. ECF No. 14 at PageID #: 70. In response, Defendant told Sgt. Johnson that he had a gun.[3] *Id.*

Defendant contests Sgt. Johnson's version of events, claiming instead that Sgt. Johnson "told [him] to stand up, said he was going to search him, and grabbed him," all before asking if "he had anything on him," to which Defendant responded that he had a gun. ECF No. 11 at PageID #: 40. At the suppression hearing, Defendant indicated he admitted possession of the weapon to avoid further problems.

Officers detained and frisked Defendant and found a loaded .40 caliber handgun hidden in his waistband. ECF No. 14 at PageID #: 71; ECF No. 11 at PageID #: 40. Defendant was escorted and placed into the backseat of one of the police cars. ECF No. 11 at PageID #: 40. He was arrested for carrying a concealed weapon and read his *Miranda* warnings. ECF No. 14 at PageID #: 71.

Following Defendant's arrest, Sgt. Johnson noticed an unoccupied Volkswagen parked nearby with the engine running, windows down, and music playing through the car stereo. *See also* ECF No. 14 at PageID #: 71. Sgt. Johnson asked the three men, including Defendant, whether the car belonged to any of them. *Id.* He received no response. Defendant denies this.[4]

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[3] Sgt. Johnson did not see a weapon, but observed that Defendant's hand was closed before Defendant dropped what later appeared to be a small bag of marijuana.

[4] There was testimony that Defendant may not have heard the question because he had already been placed in a police car, at the corner of the street with its rear windows up but driver's door open. When asked, however, if he wanted his wallet from the car,

(continued...)

After none of the men claimed ownership of the Volkswagen, Sgt. Johnson approached the vehicle and opened the driver's door to turn off the car engine. *Id.* Upon opening the car door, Sgt. Johnson spotted a 30-round magazine and a digital scale in the driver's side door pocket. *Id.* Sgt. Johnson also found a wallet containing Defendant's credit cards. *Id.*

Later, when Sgt. Johnson approached Defendant to ask whether the Volkswagen belonged to him, Defendant admitted that the vehicle was his loaner car from the dealership. *Id.* Defendant asked Sgt. Johnson to remove his keys and wallet from the vehicle before towing it. *Id.* During an inventory search of Defendant's car, the officers also found a small amount of marijuana, a box of plastic sandwich baggies, $705 in cash, and two cell phones, in Defendant's vehicle. *Id.*

Defendant was indicted on two counts. Count One charges him with being a felon in possession of a firearm and ammunition, under 18 U.S.C. § 922(g)(1), due to the loaded gun on his waist and the loaded extended magazine found in the vehicle. Count Two charges him with possessing marijuana under 21 U.S.C. § 844(a). ECF No. 1.

Defendant filed a motion to suppress, seeking suppression of all evidence found and any statements he made during and after the aforementioned events. ECF No. 11. The Court held an evidentiary hearing on April 16, 2019.

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[4](...continued)
Defendant answered that he did. This makes no difference to the ultimate disposition, as explained herein.

II.

A.

The Sixth Circuit has described three categories of permissible police-citizen encounters "that impose increasingly stringent standards." *United States v. Waldon*, 206 F.3d 597, 602 (6th Cir. 2000). A consensual encounter "may be initiated without any objective level of suspicion." *United States v. Williams*, 525 F. App'x 330, 332 (6th Cir. 2013). A non-consensual investigative encounter, such as a *Terry* stop, "must be supported by a reasonable, articulable suspicion of criminal activity." *Id.* Finally, an arrest is valid only if supported by probable cause. *Id.*

"A 'consensual encounter' occurs when 'a reasonable person would feel free to terminate the encounter.'" *United States v. Carr*, 674 F.3d 570, 572-73 (6th Cir. 2012) (quoting *United States v. Drayton*, 536 U.S. 194, 201 (2002)). For instance, if there is no other coercive behavior, "a police officer can initiate a consensual encounter by parking his police vehicle in a manner that allows the defendant to leave." *Carr*, 674 F.3d at 573. A seizure does not occur simply because a police officer approaches a person in a public place and asks that person questions. *Florida v. Royer*, 460 U.S. 491, 497 (1983). Nor does the use of overhead lights transform a consensual encounter into a compulsory stop. *Carr*, 674 F.3d at 573 (officers' use of overhead lights to identify themselves as police officers does not make an encounter non-consensual).

B.

The Government claims that law enforcement's interaction with Defendant on the night in question began as a consensual encounter. That is, when Sgt. Johnson stopped his car, exited it, and first approached Defendant, Defendant was free to leave. From the Government's perspective, that remained the case until Defendant admitted to carrying a concealed weapon, after which law enforcement frisked Defendant.

Defendant claims that the officers committed a warrantless non-consensual investigative detention by activating their overhead lights, exiting their vehicles, walking over to Defendant, and touching him. In fact, Defendant claims he was seized before he admitted having a gun. *See also* ECF No. 11 at PageID #: 41.

1.

The Court credits the Government's version of facts and finds that Defendant's testimony confirms the most salient ones. Meaning:

1. as the police approached, there was a Jeep stopped in the street, with men around it;

2. the Jeep drove away when the officers approached, and the men who had been congregated around it quickly dispersed;

3. the officers parked their cars without blocking Defendant's egress or otherwise physically blocked him from leaving;[5]

4. after leaving their cars, the officers did not draw their weapons; and

[5] Defense counsel drew attention to a chain-linked fence near the area where Defendant was seated. Examination of Defense Exhibit A-6 shows, however, that the fence was broken and provided an egress if one chose not to just walk down the street.

5. Sgt. Johnson approached Defendant and spoke to him in a "casual" conversational tone.

6. There is no evidence that the officers engaged in any coercive or intimidating behavior.[6]

Up to this point, Defendant has not shown that a reasonable person would not feel free to terminate the encounter. When asked, Defendant admitted to being armed. He said he did so to avoid having the "situation [] get dangerous." The possession of an obviously concealed weapon coupled with the indicia of drug dealing earlier observed created reasonable suspicion supporting the law enforcement action taken next.

2.

Open carry of a firearm is legal in Ohio. *Northrup v. City of Toledo Police Dep't*, 785 F.3d 1128, 1132 (6th Cir. 2015). Concealed carry of a firearm, however, is not. O.R.C. § 2923.12. Defendant does not deny that his weapon was concealed. Nor does he allege that he possessed a concealed handgun license, or, if he did, that he notified the officers of his possession of a concealed handgun license. Once Defendant admitted he was carrying a concealed firearm in violation of O.R.C. § 2923.12, the officers had, at a minimum, reasonable suspicion to stop and frisk Defendant.

3.

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[6] The dispute over the activation of overhead lights does not detract from this finding. In fact, while defense witnesses claim the lights were activated, they also claimed to have been "bumrushed" or "ambushed" b the police. This conflicts with the notion that the lights were activated, given that the activation of lights should have identified the unmarked vehicles as affiliated with the police. *See Carr*, 674 F.3d at 573.

Even if Defendant's version of events is taken as true, the officers had reasonable suspicion to believe Defendant was involved in drug dealing and was armed.

A *Terry* stop is permissible if an officer has reasonable suspicion based on articulable facts that criminal activity is afoot. *Terry v. Ohio*, 392 U.S. 1, 30 (1968). Whether there is reasonable suspicion is determined by the totality of the circumstances, including the information known to the officer and any reasonable inferences to be drawn at the time of the stop. *United States v. Townsend*, 305 F.3d 537, 542 (6th Cir. 2002). The determination invites "commonsense judgments and inferences about human behavior." *Illinois v. Wardlow*, 528 U.S. 119, 119-20 (2000).

While patrolling the area at night, Sgt. Johnson spotted a Jeep stopped in the road, surrounded by men.[7] *See also* ECF No. 14 at PageID #: 79. Once his car was spotted, the Jeep drove off, and the men quickly walked away in opposite directions.[8] *Id.* at PageID #: 80. Sgt. Johnson testified that, from his experience, these facts suggested street-level drug dealing. Street-level drug deals are commonplace in this area. The area surrounding the intersection of Union Avenue and East 76th Street ranks among the highest in the city for violence and drug

[7] Sgt. Johnson maintains that at least five men surrounded the car. The defense indicates a fewer number. That discrepancy makes little difference to the Court's analysis. The record clearly establishes a car stopped mid-street in the dark surrounded by men in a high-crime area. That alone suffices to raise the suspicion of a detective, such as Sgt. Johnson, who had arrested someone near that very location for possessing illegal drugs.

[8] It makes no small difference that, while Defendant denies having left his perch on the milk crate, he agreed that the Jeep pulled off just as the car driven by Sgt. Johnson pulled up.

dealing. *Id.* at PageID #: 79. Moreover, the encounter took place near a house suspected of hosting drug deals. Sgt. Johnson had, in the past, arrested an individual leaving that house with marijuana.[9] *Id.* The Jeep was parked "only a house or two away from the suspected drug house on East 76th Street." *Id.* Sgt. Johnson perceived Defendant to be one of the men whom he spotted standing around the Jeep. Based on the totality of circumstances, the officers had reasonable suspicion that Defendant was involved in drug dealing. This entitled them to approach Defendant and conduct a *Terry* stop.

4.

Nor can Defendant challenge the validity of the *Terry* frisk. A *Terry* frisk is proper if an officer has reasonable grounds to believe the suspect is armed and dangerous. *Terry*, 392 U.S. at 30. An officer "could reasonably rely upon the well-known fact that drug trafficking often involves the use of weapons, creating the necessary nexus between drug transactions and weapons searches." *United States v. Carter*, 558 F. App'x 606, 612 (6th Cir. 2014). The finding that the officers had good reason to believe that Defendant was engaged in drug trafficking, along with the knowledge that individuals engaging in drug trafficking are often armed, is sufficient to justify a *Terry* frisk. *See id.*

C.

Defendant's claim that his Fourth Amendment rights were violated by the officers' search of the Volkswagen fails.

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[9] The prior drug arrest was not nearly as recent as the Government's briefing suggests, but was credibly proven to have been an experience had by Sgt. Johnson on that very street near that location.

Because Sgt. Johnson initially asked Defendant whether the Volkswagen was his, and because Defendant failed to assert an ownership interest in the vehicle, he did not have a legitimate expectation of privacy in the Volkswagen. *See* *United States v. Adams*, 583 F.3d 457, 465 (6th Cir. 2009) (no reasonable expectation of privacy in jacket when the defendant failed to claim ownership of the jacket to the inquiring officer).

Even if the Court credits Defendant's claim that he was never asked whether he owned the Volkswagen (or did not hear the question when posed), the officers were still entitled to enter and secure the vehicle. The Volkswagen's windows were down, the car was running, and its stereo was playing music. Officers were, at a minimum, entitled to enter the vehicle, shut the car down, and search for documents of ownership and registration. *United States v. McClellan*, 38 F.3d 1217, at *4 (6th Cir. 1994) (Table) (citing *South Dakota v. Opperman*, 428 U.S. 364, 376 (1976)); *see also* O.R.C. § 4511.661. Upon entering the vehicle, Sgt. Johnson discovered the digital scale and extended magazine, loaded with ammunition, in the driver's door pocket. This discovery provided the officers with probable cause to search the rest of the vehicle for evidence of drug-related and firearm-related crimes. *See* *Carroll v. United States*, 267 U.S. 132, 157-58 (1925) (warrantless search of vehicle permissible if based on probable cause that the vehicle contains contraband or evidence of a crime). A further search resulted in discovery of all other evidence found in the Volkswagen, including Defendant's wallet.

Other legal theories also validate the search. After determining that the car belonged to Defendant and contained evidence of the crime of arrest, the officers were permitted to conduct a search incident to arrest. *See* *Arizona v. Gant*, 556 U.S. 332, 343-44 (2009). Moreover, even if

Defendant claims that the inventory search was, at the time, somehow improper, suppression would still be appropriate under the inevitable discovery doctrine. *See* *Nix v. Williams*, 467 U.S. 431, 444 (1984); *United States v. Motley*, 93 F. App'x 898, 901 (6th Cir. 2004) (applying inevitable discovery doctrine to inventory search of a car). Had the officers not known that the car was Defendant's, the vehicle would have been unclaimed following Defendant's arrest, and could have remained unclaimed indefinitely. The officers would then have been permitted to use reasonable means to secure and search the vehicle in the interest of public safety, including determining whether the vehicle had been stolen and thereafter abandoned. *See* *Opperman*, 428 U.S. at 368-69.

III.

For the foregoing reasons, Defendant's Motion to Suppress is denied.

IT IS SO ORDERED.

April 22, 2019
Date

/s/ Benita Y. Pearson
Benita Y. Pearson
United States District Judge